

CHAPTER 9

THE LAW OF WAR AND MILITARY OPERATIONS OTHER THAN WAR

References

1. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter H.IV or HR].
2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC].
3. The 1977 Protocols Additional to the Geneva Conventions of 1949, Dec 12, 1977, 16 I.L.M. 1391 [hereinafter GP I & II].
4. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Conv.].
5. Dept. of Army, Pamphlet 27-1, Treaties Governing Land Warfare (7 December 1956) [hereinafter DA PAM 27-1].
6. Dept. of Army, Pamphlet 27-1-1, Protocols To The Geneva Conventions of 12 August 1949 (1 September 1979) [hereinafter DA PAM 27-1-1].
7. Dept. of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962) [hereinafter DA PAM 27-161-2].
8. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956) [hereinafter FM 27-10].
9. Dept. of Army, Field Manual 41-10, Civil Affairs Operations (11 January 1993) [hereinafter FM 41-10].
10. Dept. of Army, Regulation 190-57, Civilian Internee--Administration, Employment, and Compensation (4 March 1987) [hereinafter AR 190-57].
11. Jean S. Pictet, COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (1958) [hereinafter Pictet].
12. Yves Sandoz, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1987) [hereinafter Protocols Commentary].
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14. Gerhard von Glahn, LAW AMONG NATIONS (1992).
15. L. Oppenheim, INTERNATIONAL LAW (7th ed., H. Lauterpacht, 1955) [hereinafter Oppenheim].
16. UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948).
17. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. res. 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.
18. Frank Newman and David Weissbrodt, INTERNATIONAL HUMAN RIGHTS (1996).

19. Frank Newman and David Weissbrodt, *SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* (1996).
20. U.N. CHARTER, Preamble, art. 1.

I. INTRODUCTION.

A. Military Operations Other than War (MOOTW).

1. MOOTW encompass a wide range of activities where the military instrument of national power is used for purposes other than the large-scale combat operations usually associated with war. Doctrine for Joint Operations, Joint Pub 3.0 (Feb 1995) [hereinafter JP 3.0]. *See also*, Dep't of Army, Field Manual 100-5, Operations (14 June 1993) [hereinafter FM 100-5]. While there are various types of MOOTW (*see* FM 100-5), peace operations have spawned the majority of law of war related issues.

B. Law of War.

1. Traditional law of war regimes do not technically apply to MOOTW. Examples include the following:
 - a. Operation Just Cause (Panama): "Inasmuch as there was a regularly constituted government in Panama in the course of JUST CAUSE, and U.S. forces were deployed in support of that government, the Geneva Conventions did not apply ... nor did the U.S. at any time assume the role of an occupying power as that term is used in the Geneva Conventions." Memorandum from W. Hays Parks to the Judge Advocate General of the Army of 10/1/90.
 - b. Operation Restore Hope (Somalia): The 1949 Geneva Conventions do not apply because an international "armed conflict" does not exist." Operation Restore Hope After Action Report, Office of the Staff Judge, Unified Task Force Somalia (12 Apr 1993).
 - c. Operation Uphold Democracy (Haiti): "The mandate of the MNF in Haiti was not military victory or occupation of hostile territory; rather it was "to establish and maintain a secure and stable environment" Moreover, the Carter-Jonassaint agreement - and the Aristide government's assent to that agreement - resulted in an entry that was based on consent and not hostilities between nations. Under these circumstances, the treaties and customary legal rules constituting the law of armed conflict do not strictly apply. LAW AND MILITARY OPERATIONS

IN HAITI, 1994 - 1995: LESSONS LEARNED FOR JUDGE ADVOCATES, Center for Law and Military Operations 47 (11 December 1995) (quoting Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 Am. J. Int'l L. 78-82 (1995)).

- d. Operation Joint Endeavor (Bosnia-Herzegovina). In preparation to deploy to Bosnia, the commanders of the 1st Armored Division spent a great deal of time preparing to meet the civilian challenge “posed by stability operations . . . those operations that exist outside the scope of armed conflict, but place soldiers in situations where they must simultaneously act to protect civilians and protect themselves from civilians.” See Jim Tice, *The Busiest Major Command*, Army Times, Oct. 30, 1995, at 22-23.
2. Although not falling under the rubric of “international armed conflict,” MOOTW consistently involve the potential, if not actual, employment of military force. This “disconnect” mandates that JA’s search for legal standards to guide the treatment of traditional victims of conflict, e.g. wounded, detainees, and civilians.
 - a. This search begins with Dep’t of Def. Directive 5100.77, DOD Law of War Program, (9 December 1998), which establishes the POLICY that “[T]he Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.” (The United Nations employs a similar standard to guide the actions of personnel deployed on its operations, discussed *infra*).
 - b. Because in many cases U.S. forces simply do not have the resources to fully comply with all the requirements of the law of war, this policy has been interpreted to require U.S. forces “to apply the provisions of those treaties [the Geneva Conventions] to the extent practicable and feasible.” W. Hays Parks memorandum, *supra*.
3. Recent MOOTW demonstrate that compliance with such a policy still results in “gaps” for the JA looking for standards of treatment for the various individuals encountered during such operations. What follows is a discussion of the legal standards, both international and domestic, applicable either expressly or by analogy to the treatment of civilians, detainees, and the sick and wounded during MOOTW.

II. THE IMPACT OF THE NATURE OF OPERATIONS.

A. THE CONFLICT SPECTRUM. Contemporary military operations cover a broad spectrum of “hostilities.”

1. At one extreme is invasion, MOOTW cover the rest of the spectrum, from “coerced invitation” to port calls.
2. Applicability of specific LOW Conventions is, as a result of the TRIGGERING ARTICLES of these Conventions, contingent on the nature of any given operation.
 - a. INTERNATIONAL ARMED CONFLICT. According to Common Article 2 of the four Geneva Conventions, any contention between states leading to the intervention of armed force satisfies the definition of international armed conflict.
 - (1) “International Armed Conflict” is the TECHNICAL TRIGGER for application of the LOW.
 - (2) This is an extremely broad definition, intended to ensure expansive application of humanitarian law.
 - b. UNCOERCED INVITATION. If the armed forces of one country enter another country by truly voluntary invitation, the LOW is TECHNICALLY not triggered. As a matter of Public International Law, host nation law normally governs the conduct of the visiting armed force during such operations.
 - (1) U.S. practice is to employ SOFA’s as a mechanism for ensuring application of host nation law does not operate to the detriment of U.S. forces.
 - (2) There is no legal requirement for the application of the LOW to such situations.
 - c. MOOTW (Coerced Invitation?). Many MOOTW are found at the center of the CONFLICT SPECTRUM.
 - (1) U.S. forces enter the host nation without invitation, but under some color of authority that serves to remove the operation from the realm of “international armed conflict.” [*e.g.* a Chapter VI Peacekeeping mission].

- (2) Although such operations involve the risk, and often the reality, of hostilities between U.S. forces and host nation forces, the purported authority underlying the presence of U.S. forces removes the **dispute** element of the “international armed conflict” definition.
 - (3) This situation results in a vacuum of legal authority governing the conduct of U.S. forces in such situations.
 - (a) The “semi-permissive” nature of the operation acts to displace host nation law;
 - (b) The lack of a “dispute between states” acts to prevent triggering of the LOW.
 - (4) This vacuum of legal authority **is not accompanied by a coordinate absence of legal issues facing the force.**
 - (a) MOOTW have consistently involved substantial legal issues which, if present in the context of an international armed conflict, would be resolved by application of the LOW.
 - (b) These issues generally fall under the same categories as legal issues related to traditional military operations:
 - (i) Targeting;
 - (ii) Treatment of captured personnel;
 - (iii) Treatment of civilians;
 - (iv) Treatment of the wounded and sick.
- B. There is a natural tension between the law and policy which dictate the justification for a military operation and the legal standards which we apply in the context of the operations.
1. Public International Law governs the conduct of states *vis-à-vis* other states, while . . .
 2. The Law of War governs the conduct of combatants in warfare and provides protections for the victims of war.

3. The result of this tension, or conflict of purpose, is that the Law of War (because of its truly humanitarian purpose) becomes a default position, or guide, for our conduct.

III. THE ANALYTICAL RESPONSE

- A. The JA must craft resolutions to these legal issues using systematic and innovative analytical approach based on an amalgamation of four primary sources of law.
 1. Fundamental Human Rights under International Law;
 2. Host Nation Law;
 3. Conventional Law - Treaty Law agreed upon by states (specific protections for specific individuals); and
 4. Domestic Law and Policy (including extension “by analogy” of other sources of law not technically applicable).

IV. MOOTW AND TARGETING ISSUES.

- A. As a general rule, there is no modification of general LOW targeting principles during MOOTW.
 1. Rules of Engagement will normally determine the legally justified uses of force during MOOTW.
 2. In accordance with DoD Instruction 5100.77, and CJCS Instruction 5810.01, **as a matter of policy, the U.S. complies with LOW principles during all conflicts and Military Operations Other Than War.**
- B. What about United Nations Operations?
 1. During other peace operations, e.g. peacekeeping operations, the UN position is that its forces will comply with the “**principles and spirit**” of International Humanitarian Law (Law of War). This is reflected in the model United Nations SOMA, which essentially utilizes this same **law by analogy** approach to regulating the conduct of the military forces executing United Nations missions.

- a. The Status of Forces Agreement between the UN and Haiti for the UN Mission in Haiti is an example of this policy: **“The UN will ensure that UNMIH carries out its mission in Haiti in such a manner as to respect fully the principles and spirit of the general international conventions on the conduct of military personnel.** These international conventions include the four Geneva Conventions, the Additional Protocols, and the 1954 Hague Cultural Property Convention.”
- C. JA’s must ensure that Rules of Engagement are consistent with general LOW targeting principles.

V. MOOTW AND CAPTURED PERSONNEL

A. Combatants Captured by U.S. Forces.

1. U.S. **policy** is to treat all captured personnel in accordance with the provisions of the Geneva Convention Relative to the Treatment of Prisoners of War.
 - a. This policy is focused on ensuring such captives are “respected and protected” in accordance with the spirit of the Convention.
 - b. U.S. forces will often lack the capability to comply with **every** detailed provision of the PW Convention. JA’s should bear in mind that these provisions are not legally binding during MOOTW. Focus on ensuring a “respect and protect” mentality among the force. Law by analogy (application of GPW where possible) offers the solution to most MOOTW detainee issues.
2. Host nation personnel will normally be handed over to the legitimate government, once such government is established or assumes functional control of the country.
3. Host nation law may offer a guide to treatment of detainees, during a permissive or semi-permissive intervention. [*e.g.* Haiti].

B. Treatment of “Friendly” Personnel Detained by a Hostile Party: Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 34 I.L.M. 842.

1. Signed by 43 countries, including the U.S., as of May 1997. It entered into force on 15 January 1999.

2. A response to the rising casualty figures among UN personnel deployed in support of peace operations (130 killed in 1993). Evan Bloom, Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel, 89 A.J.I.L. 621 (1995).
3. UN and associated personnel and UN operations are broadly defined so as to include associated military contingents, NGOs, contractors, and others. Forces such as the NATO force in Bosnia and UNMIH qualify for protection. Statement of U.S. Ambassador Karl F. Inderfurth to the UN General Assembly of 12/9/94.
4. Scope of Application: All cases involving UN and associated personnel and UN operations outside of those Chapter VII enforcement actions in which **any** UN forces are engaged as **combatants** against organized armed forces and to which the international law of armed conflict applies.
 - a. Refer to UN Security Council Resolution to determine if the operation is a Chapter VII operation.
 - b. Determining whether the operation is an enforcement action that requires a review of the object and purposes of the resolution, e.g. is the use of force authorized? Is the action undertaken regardless of the Parties to conflict's consent? Bloom, *supra*, at 94.
 - c. Finally, are UN personnel engaged as combatants? As discussed above, this is a difficult determination to make. The UN and U.S. position was that UN forces in Somalia and in Bosnia did **not** become combatants. No clear guidance as to when UN forces become combatants currently exists. Operation Desert Storm and traditional peacekeeping missions provide clear examples of non-applicability of the convention (i.e., LOW applies) and applicability (UN Convention applies), respectively.
5. Main goal of the Convention is to provide for universal criminal jurisdiction for those committing serious offenses against these personnel.
 - a. Prosecute or extradite standard. Designed to put pressure on governments to take more responsible action in protecting UN personnel. Denies "safe haven" to the attackers. Mahnoush H. Arsanjani, Protection of United Nations Personnel (draft), speech to Duke University Conference on Strengthening Enforcement of Humanitarian Law, 3/10/95.

- b. Consequently, this convention and the grave breach provisions of the Geneva conventions provide seamless protection to the participants. Inderfurth statement, *supra*.
- 6. Crimes enumerated in the convention include murder, kidnapping, or other attacks on the person or premises of UN and associated personnel.
- 7. If captured, these personnel are not to be interrogated and are to be promptly released. Pending their return, they are to be treated consistently with principles and spirit of the Geneva Convention.
- 8. UN and associated personnel always retain their right of self-defense.

VI. MOOTW AND THE TREATMENT OF CIVILIANS

- A. **CIVILIAN PROTECTION LAW (CPL).** CPL is an “analytical template” developed to describe the process for establishing protection for civilians across the operational spectrum. The CPL analytical process rests on the four “tiers” of legal authority:
- B. **TIER 1: Fundamental Human Rights Recognized as Binding International Law by the United States.**
 - 1. **APPLICATION.** All civilians, regardless of their status, are entitled to first tier protections. This first tier provides a foundation for JAs that represents the starting point for the legal analysis involved in the protection of civilians. Because this “core of rights” never changes, it also serves as an excellent default/start point for soldier training prior to deployment.
 - 2. **COMPOSITION.** This tier is composed of those basic protections for individuals amounting to fundamental rights recognized as international law. These rights are reflected within numerous international declarations and treaties which reflect customary international law.
 - a. **The Restatement Standard.** According to § 702 of the Restatement of the Foreign Relations Law of the United States, “[A] state violates international law if, as a matter of state policy, it practices, encourages, or condones
 - (1) Genocide,
 - (2) Slavery or slave trade,

- (3) The murder or causing the disappearance of individuals,
- (4) Torture or other cruel, inhuman, or degrading treatment or punishment,
- (5) Prolonged arbitrary detention,
- (6) Systematic racial discrimination,
- (7) a consistent pattern of gross violations of internationally recognized human rights¹

b. **The Common Article 3 Standard.** Originally intended to serve as the preface to the Geneva Conventions (it was to provide the purpose and direction statement for the four conventions), it was instead adopted as the law to regulate the controversial “non-international conflicts.”

(1) Common Article 3 is technically a component of humanitarian law, not human rights law. However, the international community now considers the protections established by this provision so fundamental that they have essentially “crossed over” to status as human rights.

(a) ICJ Position: In 1986, the International Court of Justice ruled that Common Article 3 serves as a “minimum yardstick of protection” in all conflicts, not just internal conflicts.²

(b) More expanded Common Article 3. Many experts assert Common Article 3 is applicable to any type of operation, regardless of whether or not such an operation can be described as a conflict. **This mirrors U.S. practice in recent operations.**

(2) Common Article 3 forbids:

(a) Torture;

(b) All violence to life or limb;

¹ While this provision seems to open the door to limitless argument as to what falls within this category, the comment to the Restatement indicates that to trigger this category, the violations must be the result of **state policy**. The rights in this category are reflected in the Universal Declaration of Human Rights and other international covenants. However, violations must not only be in accordance with state policy, but must be **repeated and notorious**. As a practical matter, few states establish policies in violation of such rights, even if *de facto* violations occur.

² Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

- (c) Taking of hostages;
 - (d) Degrading/humiliating treatment;
 - (e) Punishment without fair and regular trials; and
 - (f) Failure to care for and protect the wounded and sick.
- (3) Relationship between Humanitarian Law and Human Rights Law.
Military practitioners must recognize these two terms are not interchangeable (or entirely consistent).
- (a) Humanitarian Law refers to those conventions from the law of war that protect the victims of war (primarily the Geneva Conventions). Human Rights Law refers to a small core of basic individual rights embraced by the international community during the past forty years as reflected in various declarations, treaties, and other international provisions beginning with the UN Charter and Universal Declaration of Human Rights.
 - (b) International humanitarian law regulates the conduct of state *vis-à-vis* state, whereas human rights law regulates the conduct of state *vis-à-vis* individual. The right to protection under humanitarian law is vested not in the individual, but in the state. Under human rights law, the protection flows to the individual directly, and theoretically protects individuals from their own state, which was a radical transition of international law.
 - (i) Traditional View: Displacement. At the outbreak of armed conflict, human rights law, generally considered a component of The Law of Peace, is displaced by Humanitarian Law, which is generally considered a component of the Law of War.
 - (ii) Emerging View: Dual Application. At the outbreak of armed conflict, human rights law remains applicable and supplements humanitarian law (human rights law is said to apply to human conduct regardless of where along the peace, conflict, war continuum such conduct is found, and regardless of what state commits the violation).

c. **The Amalgamated List.** While there are some distinctions between the Restatement list and the Common Article 3 list, the combination results in the following well accepted human rights protected by international law:

- (1) Freedom from slavery or genocide;
- (2) The right to a fair and regular trial;
- (3) The right to be cared for when sick;
- (4) The right to humane treatment when in the hands of a state;
- (5) Freedom from torture and cruel, inhuman, or degrading treatment;
- (6) Freedom from murder, kidnapping, and other physical violence;
- (7) Freedom from arbitrary arrest and detention;
- (8) The right to be properly fed and cared for when detained or under the protection of a nation;
- (9) Freedom from systematic racial discrimination (to include religious discrimination);
- (10) Freedom from violation of other internationally recognized human rights if the violation occurs as a result of **state policy**. (Examples of such violations include **systematic** harassment, invasion of the privacy of the home, denial of fair trial, grossly disproportionate punishment, etc.)

d. **The Statutory Reinforcement.** The prohibition under international law against violation of these “Tier 1” rights is reinforced by various domestic statutes intended to ensure U.S. policy does not support nations which violate such rights. These include:

- (1) United States Foreign Assistance Act: no assistance may be provided “to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of the person . . .” 22 U.S.C. § 2151n.(a);

- (2) The Agricultural Trade Development and Assistance Act of 1954, as amended 7 U.S.C. § 1712 (precluding agreement to finance sale of agricultural commodities to such governments);
- (3) International Financial Institutions Act of 1977, 22 U.S.C. §§ 262d and 262(1) (establishing United States policy to oppose assistance to such governments by international financial institutions).

e. Universal Declaration Reinforcement.

- (1) The Universal Declaration of Human Rights, adopted unanimously by the United Nations General Assembly in 1948. It is not a treaty, however many provisions have attained the level of customary international law.
- (2) U.S. position and that of most commentators is that only the core articles within the Declaration have achieved status as customary international law. These articles include:
 - (a) The Common Article 3 “type” protections; and
 - (b) Provisions that relate to prohibiting “any state policy to practice, encourage, or condone genocide; slavery; murder; torture; or cruel, inhuman or degrading treatment; prolonged arbitrary detention; [the denial of] equal treatment before the law.”³
 - (c) Whether Declaration provisions which guarantee the right to private property reflect customary international law is less clear. The U.S. does recognize the customary status of at least the Declaration’s “core of rights to private property.”⁴
- (3) Distinguish between saying we are applying Common Article 3 type protections and providing protections “consistent with” the Declaration.
 - (a) Less flexibility. The Declaration’s core articles are reflections of customary law and must be observed. No caveat of “acting consistent with” will insulate U.S. from future obligations to comply with these provisions.

³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 702.

⁴ *Id.* § 702 k.

(b) Declaration provisions the U.S. does not consider reflective of customary international are technically not binding on the U.S. **However, these may nonetheless be integrated into the planning phase of operations and serve as guidance. The U.S. supports the spirit of the Declaration and acts consistent with all provisions unless doing so is wholly impractical.**

C. TIER 2: Host Nation (HN) Law Providing Specific Rights to an Indigenous Population.

1. APPLICATION. U.S. policy and international law require the observance of host nation law unless such law “constitutes a threat to ... security or an obstacle to the application of [international law].”⁵ Therefore, these laws must be observed **so long as they are not displaced as a result of the nature of the operation, or conflict with binding international law obligations** (in most cases such an obligation would come from Tier 1). The traditional rule is that host nation law applies unless:
 - a. Waived by international agreement, SOFA, or SOMA (in which case there is conventional international law in the form of an agreement which displaces the host nation law);
 - b. U.S. forces engage in combat with host nation forces (in which case international humanitarian law displaces host nation law); or
 - c. U.S. forces enter under the auspices of a U.N. sanctioned security enforcement mission (a Chapter VII action without the consent of the host nation).
2. COMPOSITION. Second tier protections include any protections afforded by host nation law that retain viability after the entry of U.S. forces. The most common forms of host nation protections involve rules that regulate deprivation of property and liberty.
3. SOURCES. The host nation’s (1) constitution, (2) criminal code (both substantive and procedural rules), (3) environmental protection regime, and (4) civil codes that deal with use of property. In addition, any (5) SOFAs, SOMAs, or international agreements that impact the application of host nation law.

⁵ FM 27-10, supra note 9, at para. 369 and GC, supra note 3, at art. 64.

- a. If host nation law applies to U.S. forces during a MOOTW, this includes ALL host nation law. **JA's must be alert to international human rights obligations of the host nation, even if not binding under U.S. law, because such obligations become binding as host nation law.**
 - b. JAs should seek information on host nation law and applicable international agreements from the unified command.
 - (1) Attempt to identify those countries whose host nation law may be applicable to our operations during OPLAN review.
 - (2) Attempt to gain information regarding host nation laws from sources such as Civil Affairs units and higher headquarters. Work with Civil Affairs staff elements to develop soldier guides for host nation law.
4. THE CONFLICT SPECTRUM. Applicability of host nation law may be contingent on the nature of the operation, and range from no host nation law application (armed conflict) to total control of host nation law (presence by invitation).
- a. MOOTW (Coerced Invitation?). U.S. forces enter the host nation as neither invaders or guests. Therefore, the **obligation** to follow host nation law is questionable. **The response: sensitivity to host nation law, but refusal to treat such law as absolutely binding on U.S. forces.** Operations UPHOLD DEMOCRACY and JOINT ENDEAVOR are examples of this type of status. (Adherence to Tier 1 obligations should help to ensure our forces retain the moral high ground even if they are not in full compliance with host nation law)

D. TIER 3: Conventional Law (The Hard Law).

- 1. APPLICATION. The third tier of protections are based on international obligations imposed upon U.S. forces by treaties or functional equivalent instruments. These obligations may often depend on the circumstances that surround the operation and the particular status of the civilians.
 - a. Example: Third tier protections bestowed upon a person who satisfies the definitional requirements necessary to be considered a "refugee." The "refugee" is entitled to a protected status by operation of conventional law (The Refugee Protocol).

2. COMPOSITION. This tier includes protections bestowed by treaties and other international agreements imposing binding obligations on U.S. forces, either directly or through executing legislation. Such treaties provide **protections to specific groups of persons under specific circumstances.** The conventions of the third tier, when triggered, are viewed to bind absolutely the conduct of the United States. **During any period of armed conflict involving U.S. forces, all Law of War Conventions fall within this category.**
3. SOURCES. The sources of law differ depending upon the type of operation and the status of the person. For example, the 1967 Refugee Protocol and the Refugee Act of 1980 provide protections for individuals granted that status. Third Tier law includes the various Law of War conventions. The most significant of these conventions are the Hague Regulations, the Geneva Convention Relative to the Protection of Civilian Persons, and Protocols I and II Additional to the Geneva and include the Hague Conventions.⁶
 - a. Although not ratified by the U.S., we acknowledge many provisions of **the Protocols** reflect customary international law.
 - b. Because we do not want our practice to contradict our refusal to ratify these protocols, we characterize our compliance with the principles represented therein as either compliance with customary international law, or application of law by analogy.
4. HUMAN RIGHTS TREATIES: **ASPIRATION v. OBLIGATION.** Not included within this group of conventions are the various human rights conventions ratified by the United States. Although the United States **aspires** to act in compliance with such treaties, certain domestic legal doctrines render these treaties **non-obligatory during military operations outside U.S. territory.**
 - a. The “decade of ratification.” In the past decade Presidents Reagan, Bush and Clinton have ratified a number of important human rights treaties potentially impacting the conduct of U.S. forces during future military operations.

⁶ These protections, however, apply only in a very narrow set of circumstances. First, hostilities that satisfy the GC, article 2 definition of armed conflict (common article 2) must be present. Second, the civilians must be situated under the even narrower circumstances required by each of the individual subparts of the foregoing treaties.

- (1) These treaties include the International Covenant of Civil and Political Rights (ratified in 1992); the Convention on the Prevention and Punishment of the Crime of Genocide (ratified in 1988); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment (ratified in 1994).
- b. Domestic Law of Treaty Obligation. The following two doctrines of treaty obligation explain why many of these human rights treaties are not binding on U.S. forces operating outside the U.S.
- (1) Extraterritoriality. Although the United States has ratified a number of important human rights treaties, it has reduced the importance of these treaties by stating that these regimes do not have extraterritorial application. (The opposite view is espoused by other nations and a number of well-recognized international law authorities).
- (a) Traditional presumption: human rights law is directed at regulating the way nations treat their own population. Under this view, human rights treaties do not apply extraterritorially unless the parties agree to such application.
- (b) Scope articles. Many treaties include articles specifically establishing the scope of application. For instance, article 2 of the International Covenant of Civil and Political Rights states that the treaty applies to “all individuals within [a party’s] territory **and subject to its jurisdiction.**”
- (i) These provisions do not eliminate controversy, which turns on the meaning of “subject to their jurisdiction.”
- (ii) U.S. position is that this term does not include civilians in areas outside the U.S. where our forces conduct MOOTW. Many experts believe, however, this language extends jurisdiction to such persons.
- (iii) This interpretation might dramatically alter the U.S. treaty obligation during the course of overseas operations. (The U.S. took no reservation, and made no understanding or declaration in regard to this issue).
- (2) Non-Self-Executing (NSE) Treaties. The U.S. has made a written NSE declaration during the ratification process, which it has appended to

each of these treaties (interestingly, the U.S. did not take a formal NSE reservation to any of the treaties). This theoretically removes these treaties from consideration during the course of both domestic and overseas operations.

- (a) Treaties considered non-self executing do not bind U.S. forces absent executing legislation.
- (b) If “executed,” the legislation, and not the treaty, binds U.S. forces.
- (c) Although the U.S. has not enacted legislation to execute obligations under these treaties, it does consider them during the planning and execution phases of overseas operations.
 - (i) This is a policy-based consideration and not a legally-obligated consideration. (Remember, however, that a provision of a treaty that reflects customary international law is binding on U.S. operations regardless of whether the treaty is self-executing).
 - (ii) Using non-obligatory provisions of such treaties to guide the development of policy for military operations falls under Tier 4: Law by Analogy/Extension.

E. TIER 4: U.S. Domestic Law & Policy (Including Law by Analogy/Extension).

1. APPLICATION. The 4th tier of protections emerge when JAs blend law by analogy and extension, common sense, and mission imperatives.
 - a. There are several sources of authority for the process of “law by analogy.” Both DoD Dir. 5100.77 (DoD’s Law of War Program) and the Standing Rules of Engagement (SROE) require that the Law of War and similar domestic law and policy be applied in all military operations, even where not technically triggered, to the extent such application is feasible. Additionally, any other law that logically forms the basis of an analogy should be considered.
 - b. Recent operations demonstrate this process. During Operations PROVIDE COMFORT, RESTORE HOPE, and UPHOLD DEMOCRACY.

- c. JAs dealt with the paradox of operations not considered international armed conflict which nonetheless virtually satisfied the classical elements of formal occupation. Accordingly, many of the responsibilities, rights, protections, and obligations established by traditional occupation law were observed by analogy and extension.
 - (1) This process of using analogy to other bodies of civilian protection law to develop a structure for dealing with civilian populations **is essential to fill the void of authority that results from the lag time for international law to develop standards to apply to such situations.**
 - (2) The significance of applying such a process may extend beyond any given operation. Because international law emerges from the customary practice of nations, our conduct may in fact form a foundation for future international law standards.
2. COMPOSITION. JAs familiar with the nature and likely impact on civilians of any given operation must search for third tier conventions; domestic statutes, executive orders, and directives. The objective of this process is to ascertain sources of law that will enable the force to meet mission requirements while providing civilian protection rules sufficient to maintain the legal legitimacy of the operation. Then, using third tier law as guidance, JA's synthesize lessons learned, common sense, operational realities, and mission imperatives to develop fourth tier rules.
- a. These rules must then be translated into operational parameters and transmitted to the force.
 - b. Relative to most MOOTW, third tier protections become especially significant in this process. When policy makers and JAs begin the process of determining what rules will belong within a package of fourth tier protections, the third tier almost always provides a logical start point for conducting such an analysis.
 - (1) Using such law to create a "package" of rules for the protection of civilians is an example of the U.S. acting "consistent with" laws that are not technically obligatory. **This is a critical caveat that must be included in fourth tier application of such law.**

VII. MOOTW AND OBLIGATIONS TOWARD THE WOUNDED & SICK

A. Medical activities as part of the MOOTW mission.

1. Medical activities may be undertaken as a primary mission during MOOTW. For example, health service support operations may be part of, if not the primary goal of, a larger humanitarian and civic assistance (HCA) program. In such cases, a primary mission is to seek out the sick and provide care to designated portions of the civilian population. JOINT PUB 4-02, DOCTRINE FOR HEALTH SERVICE SUPPORT IN JOINT OPERATIONS IV - 1 - IV - 2 (15 Nov. 1994). *See also* MG George A. Fisher memorandum regarding Medical-Civil Action Guidelines of 1/25/95 (attached).
2. Medical activities may also be focused primarily on supporting combat units. Law of war issues are most likely to arise under such circumstances. This raises the issue of what humanitarian standards are applicable.
 - a. The following discussion of such standards is drawn from the Geneva Wounded and Sick Convention (GWS) and experiences during Operation Restore Democracy.
 - b. Two excellent sources of lessons learned in this area are Memorandum from MG George A. Fisher, MNF Medical Rules of Engagement (ROE) Policy of 1/25/95, and Asbjorn Eide, Allan Rosas, Theodor Meron *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards* 89 A.J.I.L. 215 (1995) (discussing certain minimum humanitarian standards applicable to all situations).

B. Humanitarian Standards.

1. Respect and protect the wounded and sick (Article 12 GWS). The obligation not to attack the wounded and sick and to provide basic care. The type of basic care provided is discussed *infra* in terms of emergency care. The categories of wounded and sick persons is generally considered to include civilians.
2. Search for and collect wounded and sick and the dead (Article 15, GWS). This standard does not translate well to MOOTW. At best it can be applied to the extent practicable and feasible. W. Hays Parks memorandum, *supra*.
 - a. Note that even under the GWS, this requirement is subject to military practicability, i.e. the obligation is not absolute.

- b. Furthermore, the obligation to search for civilian wounded under GC Article 16 (“as far as military consideration allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded [civilians]) is not as strong as the obligation to search for those protected under the GWS (primarily members of the armed forces). This language recognizes the primacy of civilian authorities in the matter of caring for civilians. *See* DEP’T OF ARMY FIELD MANUAL 8-10, HEALTH SERVICE SUPPORT IN A THEATER OF OPERATIONS, para. 3-17 (1 Mar 1991).
 - c. Finally, consistent with the primacy of civilian authorities mentioned above, there are also sovereignty issues at play in situations such as those encountered in Panama and Haiti. “Primary responsibility for the collection, burial, and accountability for the wounded and dead lay with the Government of Panama. U.S. assumption of any responsibility for the burial of deceased Panamanians, military or civilian, would have constituted a breach of Panama’s sovereignty without its express consent.” W. Hays Parks memorandum, *supra*.
 - d. Consequently, the U.S. policy in Haiti was to render emergency care required to save life, limb, or eyesight to Haitian civilians. Thus, on site medical personnel were permitted to provide emergency stabilization, treatment, and to arrange transportation to civilian hospitals. Additionally, in Haiti, treatment was provided to those persons injured as a result of U.S. actions. *See* MG Fisher memorandum, *supra*.
3. Medical, religious and other humanitarian personnel shall be respected and protected. U.S. forces should have no difficulty complying with this standard.

APPENDIX A

CPL AND CIVILIAN DETAINMENT

VIII. DEPRIVATION OF LIBERTY.

A. Four types of deprivation:

1. Detainment;
2. Internment;
3. Assigned residence;
4. Simple imprisonment (referred to as confinement in AR 190-57)⁷:
 - a. Includes pre/post-trial incarceration.
 - b. Pretrial confinement must be deducted from any post-trial period of confinement.
 - c. A sentence of to imprisonment may be converted to a period of internment.
 - d. GC Arts. 68-71.

B. DETAINMENT IN MOOTW.

1. Detainment defined: Not formally defined in International Law. Although it may take on characteristics of confinement, it is more analogous to internment (which is formally defined and explained in the LOW). Within Operation JOINT ENDEAVOR detention was defined as “a person involuntarily taken into custody for murder, rape, aggravated assault, or any act or omission as specified by the IFOR Commander which could reasonably be expected to cause serious bodily harm to (1) civilians, (2) non-belligerents, or (3) IFOR personnel.”⁸

⁷ The distinction between confinement and internment is that those confined are generally limited to a jail cell ("CI camp stockade"), while internees remain free to roam within the confines of a internee camp. AR 190-57, para. 2-12.

⁸ See TASK FORCE EAGLE: JOINT MILITARY COMMISSION POLICY AND PLANNING GUIDANCE HANDBOOK (21 Mar. 1996).

2. Detainment is Typically Authorized (by a designated task force commander) For:
 - a. Serious crimes (as described above);
 - b. Posing a threat to U.S. forces (or based upon CINC authority, the coalition force);
 - c. Violating rules set out by the intervention forces. For example, the IFOR in Operation JOINT ENDEAVOR authorized detainment for persons who attempted to enter controlled areas or attack IFOR property.⁹
 - d. Obstructing the forces' progress (obstructing mission accomplishment in any number of ways to include rioting, demonstrating, or encouraging others to do so).
3. While these categories have proved effective in past operations, JA's must ensure that the categories actually selected for any given operation are derived from a mission analysis, and not simply from lessons learned.
4. The LOW (and therefore, the Geneva Conventions) does (do) not technically apply to MOOTW. However, pursuant to the fourth tier methodology, the LOW should be used as guidance during MOOTW.
5. In MOOTW, JAs should:
 - a. Advise their units to exhaust all appropriate non-forcible means before detaining persons who obstruct friendly forces.
 - b. Look to the mission statement to determine what categories of civilians will be detained. The USCINCENT Operation Order for Unified Task Force Somalia (1992) set out detailed rules for processing civilian detainees. It stated that:
 - c. In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will: . . . Detain those accused of criminal acts or other violations of public safety and security.

⁹ Id.

d. After determining the type of detainees that will find their way into U.S. hands, they should apply the four-tiered process of CPL to determine what protections should be afforded to each detainee.

(1) Tier 1: Detainment SOPs might provide that all detainees will be afforded rights “consistent with” with the Universal Declaration of Human Rights and Common article 3.

** The term “consistent with” is a term of art insulating the U.S. from assertions of formal recognition that we are bound to certain obligations. The U.S. does not say anyone is entitled to anything. This ties in with the confusion relative to which protections under the Universal Declaration are customary law and which are not.

(2) These protections are translated into rules such as those listed below, which were implemented by the IFOR during Operation JOINT ENDEAVOR:

(a) Take only items from detainees that pose an immediate threat to members of the force or other detainees.

(b) Use minimal force to detain or prevent escape (this may include deadly force if ROE permits).

(c) Searches must be conducted in such a way as to avoid humiliation and harassment.

(d) Detainees shall be treated humanely.

(e) Detainees shall not be physically abused.

(f) Contact with detainees may not be of a sexual nature.

(3) Detainees may not be used for manual labor or subservient tasks.

(4) Tier 2: Apply procedural protections afforded by the host nation to individuals detained under similar conditions. For example, if the host nation permits the right to a magistrate review within so many hours, attempt to replicate this right if feasible.

(5) Tier 4: JOINT ENDEAVOR SOPs provide detainees with the right to EPW treatment (EPW status is not bestowed, although a few SOPs incorrectly state that it is).

- (6) Categorization and Segregation. The SOPs then go on to provide that the detainees will be categorized as either criminal or hostile (force protection threats). Those accused of crimes must be separated from those detained because they pose a threat to the force. In addition, detainees must be further separated based upon clan membership, religious beliefs, or any other factor that might pose a legitimate threat to their safety.
- e. In both Somalia and Haiti, the U.S. ran extremely successful Joint Detention Facilities (JDFs). The success of these operations was based upon a simple formula.
- (1) Detain people based upon a clear and principled criteria.
 - (2) Draft an JDF SOP with clear rules that each detainee must follow and rights to which each detainee is entitled.
 - (3) Base the quantity and quality of the rights upon a principled approach: CPL.
6. When in the fourth tier (law by analogy) look to the GC, in addition to the GPW when dealing with civilians. The practice of JTF JAs in Operations RESTORE HOPE and RESTORE DEMOCRACY was to look only to the GPW. This caused a number of problems “because the GPW just did not provide an exact fit.”

SNAPSHOT OF MOOTW DETAINMENT RULES (ANALOGIZED FROM THE GC AND OTHER APPLICABLE DOMESTIC AND INTERNATIONAL LAW).

- C. Every civilian has the right to liberty and security. NO ONE SHALL BE SUBJECTED TO ARBITRARY ARREST OR DETENTION. Int'l Cov. on Civil & Pol. Rts. Art. 9. (Univ. Declar. of Human Rights Art. 9). This is consistent with the GC requirement that detention be reserved as the commander's last option. GC, Art. 42.
- D. Treatment will be based upon international law, without distinction based upon "race, colour, sex, language, political or other opinion, national or social origin, property, birth, or other status." Univ. Declar. of Human Rights Art. 2.
- E. No detainee shall be subjected to cruel, inhuman, or degrading treatment. Univ. Declar. of Human Rights, Art. 5.
- F. Detain away from dangerous areas. GC, Arts. 49 and 83.
- G. The place of detainment must possess (to the greatest extent possible) every possible safeguard relative to hygiene and health. GC Art. 85.
- H. Detainees must receive food (account shall be taken of their customary diet) and clothing in sufficient quantity and quality to keep them in a good state of health. GC, Art. 89.
- I. Detainees must be maintained away from PWs and criminals. GC, Art. 84. In fact, U.S. commanders should establish three categories of detainees:
 - 1. Those detained because of suspected criminal Activity;
 - 2. Those detained because they have been convicted of criminal; and
 - 3. Those detained because they pose a serious threat to the security of the force (an expectation of future activity, whether criminal or not.
- J. Detainees shall be detained in accordance with a standard procedure, to which the detainee shall have access. GC, Art. 78. Detainees have the right to appeal their detention. The appeal must be processed without delay. GC, Art. 78.
- K. Adverse decisions on appeals must (if possible) be reviewed every six months. GC, Art. 78.

- L. Detainees retain all the civil rights (HN due process rights), unless incompatible with the security of the Detaining Power. GC, Art. 80.
- M. Detainees have a right to free medical attention. GC, Arts. 81, 91, & 92.
- N. The Detaining Power must provide for the support of those dependent on the detainee. GC, Art. 81.
- O. Families should be lodged together during periods of detainment. Detainees have the right to request that their children be brought to the place of detainment and maintained with them. GC, Art. 82.
- P. Forwarding Correspondence.
 - 1. In absence of operational limitations, there are no restriction on the number or length of letters sent or received. In no circumstance, will the number sent fall below two cards and four letters. AR 190-57, para. 2-8.
 - 2. No restriction on whom the detainee may correspond. AR 190, para. 2-8.
 - 3. No restriction on the number or type of correspondence to either military authorities or Protecting Power (ICRC).

The foregoing rules applicable to internment, found in Section IV of Geneva IV and AR 190-57, are but an abbreviated list of the complete list of rules that apply.

CPL AND THE TREATMENT OF PROPERTY

IX. TREATMENT OF PROPERTY.

- A. Tier 1. Every person has the right to own property, and no one may be arbitrarily deprived of such property. (Univ. Declar. of Human Rights Art. 17).
- B. Tier 2. The property laws of the host nation will control to the extent appropriate under Public International Law (The Picard Spectrum).
 - 1. Consider the entire range of host nation law, from its constitution to its property codes. For example in Operation UPHOLD DEMOCRACY the JTF discovered that the Haitian Constitution afforded Haitians the right to bear arms. This right impacted the methodology of the JTF Weapons Confiscation Program.
- C. Tier 3. If a non-international armed conflict is underway, only Common Article 3 applies, which provides no protection for property. If an international armed conflict is underway, the property protections found with the fourth Geneva Convention apply. The protections found within this convention are described in chapter six as the nine commandments of property protection.
 - 1. During an international armed conflict, any destruction not “absolutely necessary” for the conduct of military operations is a war crime (GC, art. 53). Further, if that destruction, devastation, or taking of property is “extensive” or comprehensive, the crime is considered a grave breach of the law of war (GC, art. 147). Accordingly, the “prosecute or extradite” mandate would apply to the individual/individuals responsible for such misconduct (GC, art. 146).
 - a. What does “extensive damage” mean? In the official commentary to the convention, Pictet states that “extensive” means more than a “single incident.” However, Pictet does not discuss the possibility of a single attack that is of great scope (destruction of an entire city grid or more).
 - b. Is this definition limited only to property in the hands of the enemy? Pictet also notes that article 147 modifies and supplements only article 53. This is important because article 53 only applies to property within

occupied territory. Accordingly, if a warring nation were to bomb a civilian factory, and this bombing was not of absolute military necessity, one might conclude it is not a grave breach, and maybe not a breach at all (although it might violate article 23 of the Hague Regulations).

D. Tier 4 (Law by Analogy).

1. Follow the nine commandments of property use during armed conflict.
2. The occupying power cannot destroy “real or personal property . . . , except where such destruction is rendered absolutely necessary”. GC Art. 53.
3. **Pillage**. Defined as the “the act of taking property or money by violence.” Also referred to as plundering, ravaging, or looting.”
 - a. Forbidden in all circumstances (one of the general provision protections of Section I).
 - b. Punishable as a war crime or as a violation the UCMJ.
 - c. The property of a protected person may not be the object of a reprisal. (GC Art. 33).
 - d. **Control of Property**. The property within an occupied territory may be controlled by the occupying power to the extent:
 - (1) Necessary to prevent its use by hostile forces.

OR

- (2) To prevent any use which is harmful to the occupying power.
- (3) **NOTE:** As soon as the threat subsides, private property must be returned. FM 27-10, Para. 399.
- e. Understand the relationship between the battlefield acquisition rules of Tier Three’s conventional law property protections and the U.S. Military’s Claims System. *See* Operational Law Handbook and chapter six of this deskbook.
- f. Protection of Civilian Property Under the Third Convention. For persons under the control of our forces (detained persons, etc.), the United States has frequently provided protection of property provided to EPWs under

the Third Geneva Convention. For instance, all effects and articles of personal use, except arms and military equipment shall be retained by an EPW (GPW, art. 18). This same type of protection has a natural extension to civilians that fall under military control.

APPENDIX C

CPL AND DISPLACED PERSONS

X. TREATMENT OF DISPLACED PERSONS (REFUGEES).

A. Generally, nations must provide refugees with same treatment provided to aliens and in many instances to a nation's own nationals. The most basic of these protections is the right to be shielded from danger.

1. REFUGEE DEFINED. Any Person:

- a. Who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;
- b. Who is outside the nation of his nationality; and
- c. Is without the protection of his own nation, either because:

(1) That nation is unable to provide protection, or

(2) The person is unable to seek the protection, due to the well-founded fear described above.

** Harsh conditions, general strife, or adverse economic conditions are not considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee.

** The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status is an excellent source of information on this subject. However, practitioners must recognize that the standards established by the UNHCR do not always correspond with U.S. policy.

2. **MIGRANT DEFINED:** Those who do not necessarily qualify for refugee status and the accompanying rights. The 1967 Protocol is not self-executing and therefore does not bestow any rights upon a person claiming refugee/refuge/political asylum status. Nation states are free to apply the definitional elements found with the Protocol.

B. MAIN SOURCES OF LAW:

- 1. 1951 Convention Relating to the Status of Refugees (RC). The RC bestows refugee status/protection on pre-1951 refugees.

2. 1967 Protocol Relating to the Status of Refugees (RP). The RP bestows refugee status/protectations on post-1951 refugees.
 - a. Adopts same language as 1951 Convention.
 - b. U.S. is a party (110 ratifying nations).
3. 1980 Refugee Act (8 U.S.C. § 1101). Because the RP was not self-executing, this legislation was intended to conform U.S. law to the 1967 RP.
 - a. Applies only to refugees located inside the U.S.¹⁰
 - b. This interpretation was challenged by advocates for Haitian refugees interdicted on the high seas pursuant to Executive Order. They asserted that the international principle of “non-refoulment” (non-return) applied to refugees once they crossed an international border, and not only after they entered the territory of the U.S.
 - c. The U.S. Supreme Court ratified the government interpretation of “non-refoulment” in *United States v. Sale*. This case held that the RP does not prohibit the practice of rejection of refugees at our borders. **(This holding is inconsistent with the position of the UNHCR, which considers the RP to prohibit “refoulment” once a refugee crosses any international border).**
4. Immigration and Nationality Act (8 USC §1253).
 - a. Prohibits Attorney General from deporting or returning aliens to countries that would pose a threat to them based upon race, religion, nationality, membership in a particular social group, or because of a particular political opinion held.
 - b. Does not limit U.S. authority outside of the U.S. (Foley Doctrine on Extraterritoriality of U.S. law).
5. Migration and Refugee Assistance Act of 1962 (22 USC §2601).

¹⁰ Although the phrase “within the U.S.” was removed in 1980, the courts have steadfastly interpreted this only to apply to the difference in the status of aliens already within the U.S. “Within the U.S.” is a term of art used to apply to persons who have legally entered the U.S. A person who is physically within the U.S., having entered illegally, is not “within the U.S.”

- a. Qualifies refugees for U.S. assistance.
- b. Application conditioned upon positive contribution to the foreign policy interests of U.S.

C. RETURN/EXPULSION RULE.

1. No Return Rule (RP art. 33). Parties may not return a refugee to a territory where his life or freedom would be threatened on account of his race, religion, nationality, social group, or political opinion.
2. No Expulsion Rule (RP arts. 32 & 33). Parties may not expel a refugee in absence of proper grounds and without due process of law.
3. According to the Supreme Court, these prohibitions are triggered only after an individual crosses a U.S. border. This is the critical distinction between the U.S. and UNHCR interpretation of the RP which creates the imperative that refugees be intercepted on the high seas and detained outside the U.S.
4. Grounds for Return or Expulsion.
 - a. Expulsion: (1) national security, (2) public order, or (3) danger to the community.
 - b. Return: (1) national security or (2) danger to the community.
5. Burden of Proof.
 - a. National security or public order = reasonable grounds.
 - b. Danger to community = conviction of serious crime.
 - c. Public Health Risks (e.g. HIV Positives):
 - (1)excludable as a threat to national security.
 - (2)Attorney General may waive medical exclusion for “humanitarian reasons.”
6. Other Traditional Exclusion Grounds:
 - a. Prostitution

- b. Membership in communist or other totalitarian political group.
 - c. Aliens who have made previous illegal entries.
- D. FREEDOMS AND RIGHTS. Generally, these rights bestow (1) better treatment than aliens receive, and (2) attach upon the entry of the refugee into the territory of the party.
- 1. Freedom of Religion (equal to nationals).
 - 2. Freedom to Acquire, Own, and Convey Property (equal to aliens).
 - 3. Freedom of Association (equal to nationals).
 - 4. Freedom of Movement (equal to aliens).
 - 5. Access to Courts (equal to nationals).
 - 6. Right to Employment (equal to nationals with limitations).
 - 7. Right to Housing (equal to aliens).
 - 8. Public Education (equal to nationals for elementary education).
 - 9. Right to Social Security Benefits (equal to nationals).
 - 10. Right to Expedited Naturalization.
- E. DETAINMENT (See MOOTW DETAINMENT above).
- 1. U.S. policy relative to Cuban Refugees (MIGRANTS) is to divert and detain.
 - 2. General Principles of International Law forbid “prolonged & arbitrary” detention.
 - 3. Detention that preserves national security is not arbitrary.
 - 4. No statutory limit to the length of time for detention (4 years held not an abuse of discretion).
 - 5. Basic Human Rights apply to detained or “rescued” refugees.
- F. POLITICAL ASYLUM. Protection and sanctuary granted by a nation within its borders or on the seas, because of persecution or fear of

persecution as a result of race, religion, nationality, social group, or political opinion.

G. TEMPORARY REFUGE. Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. NEITHER POLITICAL ASYLUM NOR TEMPORARY REFUGE IS A CUSTOMARY LAW RIGHT. A number of plaintiffs have attempted to assert the right to enjoy international temporary refuge has become a peremptory right under the doctrine of *jus cogens*. The federal courts have routinely disagreed. Consistent with this view, Congress intentionally left this type of relief out of the 1980 Refugee Act.

1. U.S. POLICY.

a. Political Asylum.

- (1) The U.S. shall give foreign nationals full opportunity to have their requests considered on their merits.
- (2) Those seeking asylum shall not be surrendered to a foreign jurisdiction except as directed by the SECARMY.
- (3) These rules apply whether the requester is a national of the country wherein the request was made or from a third nation.
- (4) The request must be coordinated with the host nation, through the appropriate American Embassy or Consulate.

** This means that U.S. military personnel are never authorized to grant asylum.

b. Temporary Refuge. The U.S., in appropriate cases, shall grant refuge in foreign countries or on the high seas of any country.

** This is the most the U.S. military should ever bestow.

H. IMPACT OF LOCATION WHERE CANDIDATE IS LOCATED.

1. IN TERRITORIES UNDER EXCLUSIVE U.S. CONTROL & ON HIGH SEAS:

a. Applicants will be received in DA facilities or on aboard DA vessels.

- b. Applicants will be afforded every reasonable protection.
- c. Refuge will end only if directed by higher authority, “through the SECARMY.”
- d. Military personnel may not grant asylum.
- e. Arrangements should be made to transfer the applicant to the DOJ INS ASAP. Transfers don’t require DA approval (local approval).
- f. All requests must be forwarded in accordance with AR 550-1, para 7.
- g. Inquiries from foreign authorities will be met by the senior Army official present with the response that the case has been referred to higher authorities.
- h. No information relative to an asylum issue will be released to public, without HQDA approval.
 - (1) Immediately report all requests for political asylum/temp. refuge” to the Army Operations Center (AOC) at Commercial (703) 697-0218 or DSN 227-0218.
 - (2) The report will contain the information contained in AR 550-1.
 - (3) The report will not be delayed while gathering additional information
 - (4) Contact International and Operational Law Division, Army OTJAG (or service equivalent). The AOC immediately turns around and contacts the service TJAG for legal advice.

2. IN FOREIGN TERRITORIES:

- a. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge.
- b. The senior Army officer may grant refuge if he feels the elements are met: If individual is being pursued or is in imminent danger of death or serious bodily injury.
- c. If possible, applicants will be directed to apply in person at U.S. Embassy.

- d. During the application process and refuge period the refugee will be protected. Refuge will end only when directed by higher authority.